Federal Communications Commission
Washington, D.C. 20554

DA 05-2225
Released: July 29, 2005

Sweetwater Broadcasting Company
c/o Jonathan Lichstein
1500 Foremaster Lane
Las Vegas, NV 89101

Uhlmann/Latshaw Broadcasting, LLC
P.O. Box 419410
Kansas City, MO 64141

Bozeman Trail Communications Company
c/o J. Dominic Monahan, Esquire
Ulvas, Cobb, Richards & Fraser, PC
777 High Street, Suite 300
Eugene, OR 97401

Re: Application for Consent to Transfer Control of the Licensee of Station KCWY(TV)
Casper, Wyoming
File No. BTCCT-20040217ACN
Facility ID No. 68713
NAL Acct. No. 0541420016
FRN: 0003748662

Gentlemen:

This is with regard to the application on FCC Form 315 to transfer control of Sweetwater Broadcasting Company (Sweetwater), licensee of Station KCWY(TV), Casper, Wyoming, from Uhlmann/Latshaw Broadcasting, LLC (ULB) to Bozeman Trail Communications Company (BTC), which is owned and controlled by Sunbelt Communications Company (Sunbelt). A timely Petition to Deny the application was filed by Max Media of Montana LLC (Max Media). This letter also constitutes a NOTICE OF APPARENT LIABILITY FOR A FORFEITURE against Sweetwater pursuant to Section 503(b) of the Communications Act of 1934, as amended ("Act"), under authority delegated to the Chief, Media Bureau, by Section 0.283 of the Commission's Rules, 47 C.F.R. §0.283. As set forth herein, it appears that Sweetwater willfully and repeatedly violated Sections 73.3526, 73.3613 and 73.3615 of the Commission's Rules.[1]

[1] 47 C.F.R. §§ 73.3526, 73.3613 and 73.3615.

Background. By the subject application, ULB proposes to transfer its 51 percent interest in Sweetwater to BTC, which currently holds a 49 percent interest in the licensee.[2] In this regard, ULB and BTC are signatories to a Stock Purchase Agreement dated July 30, 1998. That agreement contemplated the creation of Sweetwater, the transfer of 49 percent of that licensee to BTC, and an option for BTC to obtain ULB's controlling 51 percent interest in Sweetwater to be exercised within 45 days after KCWY began program testing. By letter dated March 16, 2001, BTC purportedly exercised that option, and on November 24, 2003, ULB filed a long-form application to transfer its 51 percent interest and ultimate control of Sweetwater to BTC.[3] On February 15, 2004, that application was dismissed by the staff because it failed to include a copy of the underlying Stock Purchase Agreement giving rise to the contemplated transaction.[4] Two days later, the parties re-filed the subject application, along with a copy of the Stock Purchase Agreement, and Max Media filed its petition to deny.

<u>Transfer of Control Application</u>

Petition to Deny. Max Media is the former licensee of KTGF(TV), Great Falls, Montana.[5] It claims standing as interested party to this proceeding because the network programming arrangements for KCWY are tied to the network programming arrangements for other television stations under common control with BTC which Max Media alleges adversely impact KTGF. Specifically, on February 25, 2004, Max Media filed a "Request for Expedited Declaratory Ruling" challenging the network arrangements between NBC and six television stations (including KCWY) purportedly under common control of Sunbelt and alleging that those arrangements appear to violate the "territorial exclusivity" provisions of Section 73.658(b) of the Commission's Rules, 47 C.F.R. §73.658(b).

Although Max Media acknowledges that the Commission is assessing its territorial exclusivity complaint in a separate proceeding, it maintains in the instant petition that those allegations also evidence one of a variety of means that Sunbelt has employed to exercise *de facto* control of KCWY without FCC consent before the station was even constructed. Max Media asserts that in 1998 when Sunbelt acquired its 49 percent interest in the licensee, it also obtained: an unconditional option to acquire the remaining 51 percent pursuant to a Stock Purchase Agreement; the right to build the station pursuant to a Construction and Lease Agreement; and the right to program nearly the entire KCWY schedule, subject only to Sweetwater's "reasonable approval," pursuant to a Time Brokerage Agreement. Max Media also

2 BTC acquired its interest in the licensee from ULB pursuant to the September 1, 1998 grant of a short-form application (File No. BAPCT-19980813IA).

3 File No. BTCCT-20031124OH.

4 Max Media filed a petition to deny this transfer application claiming, among other things, the failure of the parties to submit a copy of the Stock Purchase Agreement with the transfer application. It also stated that it could not obtain a copy of that agreement from the licensee or elsewhere in the Commission's records.

5 On November 24, 2004, Max Media assigned the KTGF license, which is currently held by Destiny Licenses, LLC.

states that Sunbelt agreed with NBC in 1999 to shift its network affiliation in Casper to Sunbelt (or one of its affiliates) at such time that it had an operational facility and staff in that community. Although KCWY was not specifically named in the agreement with NBC, Max Media suggests that Sunbelt's control of KCWY is evidenced by the fact that NBC subsequently shifted its affiliation in the Casper market to that station in September 2003.[6]

Max Media therefore contends that before approving this transaction, the Commission should investigate whether there was a premature transfer of control of the KCWY license; whether the parties intentionally misrepresented or lacked candor with respect to the false certification that copies of all agreements were submitted with this and the dismissed November 24, 2004 transfer application; and whether BTC's parent company (Sunbelt) had *de facto* control and exercised legal authority on behalf of the licensee when Sunbelt "violated the network territorial exclusivity rule in the 1999 arrangement with NBC." Max Media states that, in any event, because a violation of the network exclusivity rule is a "disqualifying, license-revocation rule violation," this application should not be granted until its complaint against Sunbelt is resolved.

In its opposition pleading, Sweetwater asserts that Max Media's petition is baseless and has been submitted to harass and obstruct operations involving Sunbelt. It contends that the petition should be dismissed because Max Media lacks standing and has presented no factual basis to support its arguments.[7] Sweetwater also argues that the agreements between ULB and BTC do not evidence a shift of control of KCWY because the licensee -- through its majority shareholder ULB – retains ultimate control of the station. Moreover, it argues that although BTC has the right to program nearly all of KCWY's broadcast schedule, that is irrelevant as "the Commission has never set limits on the amount of time a brokered station could sell." Moreover, Sweetwater asserts that such facts would only be relevant if the licensee had completely forfeited its responsibilities, which is not the case here.

In a reply pleading, Max Media states that Sweetwater's arguments regarding the submission of the Loving affidavit are without merit. It argues that the affidavit meets the statutory requirement that a petition to deny be accompanied by the affidavit of one with personal knowledge of the facts alleged, and that Sweetwater's contention that it is "borrowed"

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[6] Max Media states that a copy of KCWY's network affiliation agreement with NBC is not available for inspection from the station's public inspection file or the Commission's records.

[7] Specifically, Sweetwater states that Max Media's allegations are not supported by a proper affidavit of one with personal knowledge of the facts alleged. In this regard, Max Media has submitted documents contained in its other filings, including the affidavit of Eugene Loving, its Chairman and Chief Executive Officer, to support its instant petition. Sweetwater states that those documents are defective because they were submitted in other proceedings and a "petitioner cannot 'borrow' an affidavit from one proceeding and apply it towards (sic) another." It further argues that Loving's affidavit, originally submitted with the territorial exclusivity complaint, is irrelevant to this proceeding because it was signed almost two months prior to the filing of the instant application and does not show that he has personal knowledge of the facts alleged in this proceeding other than that NBC shifted its affiliation in the Casper market to KCWY. It maintains that "in order for this Petition to be valid, Mr. Loving would have to execute a new affidavit."

from another proceeding is without merit. Moreover, it asserts that Sweetwater's references to a few select portions of the time brokerage agreement that address licensee control prove little when viewed against the larger context of how the station is actually operated by BTC's principals. It therefore urges the Commission to look beyond the boiler-plate language in the time brokerage agreement to examine the facts and circumstances presented regarding BTC's control of KCWY. In that regard, it states that the Stock Purchase Agreement between the parties provided BTC with the "unilateral opportunity" to take control of Sweetwater before the station was even constructed. That, combined with BTC's apparent control over nearly all KCWY's program schedule and its exercise of legal authority on behalf of the station in its arrangements with NBC, leads Max Media to conclude that an unauthorized transfer of control of the station has already taken place.

Discussion. As an initial matter, we conclude that Max Media lacks standing. A petition to deny may only be filed by a party in interest. *See* 47 U.S.C. § 309(d)(1) and 47 C.F.R. § 73.3584. Party in interest status is deemed to exist when a petitioner demonstrates that the grant of the petitioned application will cause the petitioner a direct injury. *See Sierra Club v. Morton,* 405 U.S. 727, 733 (1972); *see also National Broadcasting Co.,* 37 FCC 2d 897, 898 (1972). A causal link between the injury and the challenged action must be shown by the petitioner. *See Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 72, 78 (1978). This causal link is established when the injury is "fairly traceable" to the challenged action and the injury would be prevented or remedied by grant of the application. *Id.,* at 74, 81. Not only must a petitioner demonstrate that it is a party in interest, the petition must contain specific factual allegations demonstrating that the grant of the application would be inconsistent with the public interest, convenience and necessity.[8]

Although Max Media's standing argument is based on its assertion that the programming arrangements for KCWY are tied to network programming arrangements for other stations in different television markets which adversely affect KTGF, it fails to provide any specific factual allegations demonstrating direct injury *vis-à-vis* the Sweetwater transfer application – Max Media does not compete with Sweetwater in this television market and has not shown how it will be prejudiced by the grant of this application.[9] In light of Max Media's failure to meet its burden to establish standing, we will dismiss its petition and treat it as an informal objection pursuant to 47 C.F.R. § 73.3587. Moreover, after considering Max Media's and Sweetwater's pleadings, we find that no substantial and material question has been presented concerning BTC's participation

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[8] The allegations contained in the petition must also be supported by an affiant with personal factual knowledge, except for those allegations of which official notice may be taken. *See* 47 U.S.C. § 309(d)(1). Sweetwater challenges the validity of Loving's affidavit submitted in support of this petition because it was also submitted in another Commission proceeding, specifically Max Media's complaint to the Commission regarding Sunbelt's network affiliation arrangements. However, Sweetwater offers no support for its argument, and we find no basis to reject the affidavit on this account. In addition, because it was filed and part of the record in another Commission proceeding, there is nothing to prohibit us from taking official notice of the subject affidavit.

[9] Moreover, the grant of this application will not impact the evaluation of Max Media's request for a declaratory ruling on Sunbelt's network arrangements with NBC, which has been undertaken in a separate proceeding.

in the affairs of KCWY. However, as discussed below, it appears that Sweetwater has violated the Commission's Rules with respect to the reporting and filing of certain contracts, as well as placing copies thereof in the station's public inspection file.

Evaluation of Max Media's allegations that BTC is in *de facto* control of KCWY involves a two-step process. First, we determine whether the petition sets forth specific allegations of fact which, if true, would demonstrate that grant of the subject application would be *prima facie* inconsistent with the public interest. If so, we then determine, on the basis of the application, the pleadings filed, or other matters which may be officially noted, whether a substantial and material question of fact is presented requiring resolution in a hearing.[10] Thus, even if a *prima facie* inconsistency with the public interest is presented, the Commission must still decide "whether the totality of the evidence arouses a sufficient doubt to the point that further inquiry is called for."[11] We have reviewed the pleadings and other matters before us under this standard and find that no further inquiry is required because no substantial and material question of fact has been presented requiring further Commission action, or that the grant of the instant application would be contrary to "the public interest, convenience and necessity."

In this regard, when evaluating allegations of *de facto* control, the Commission focuses its review on whether the entity in question makes policies and decisions in three main areas of station operation: programming, personnel and finances. *See WHDH, Inc.,* 17 FCC 2d 856 (1969), *aff'd sub nom, Greater Boston Television, Corp. v. FCC,* 444 F.2d 841 (D.C.Cir. 1970), *cert. denied* 403 U.S. 923 (1971). The time brokerage agreement for KCWY complies with Commission policies as it makes clear that ULB has ultimate control over all programming and personnel decisions and policies. Max Media has submitted nothing to indicate that ULB has abdicated the primary responsibilities of a broadcast licensee. Moreover, BTC's financial participation as a minority interest-holder in the licensee and its option to acquire control of the station does not compel the conclusion that it controls the licensee or has the ability to exert improper influence over the core operations of the station prior to Commission authorization, as alleged by Max Media. BTC's acquisition of its initial minority stake in the licensee was the subject of the 1998 short-form application, and that interest was reported in Sweetwater's subsequent ownership filings at the Commission. Our rules make clear that a mere option to acquire the licensee does not convey control.[12] Further, after BTC elected to exercise its option to acquire ultimate control of the station, the parties filed the proper application and disclosed all relevant facts. There is nothing before us to indicate that BTC has assumed premature control of the station, either before the filing of the subject application or during its pendency. Based on the foregoing, we find that the applicants are fully qualified and that grant of the transfer of control application will serve the public interest.

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[10] 47 U.S.C. §§ 309(d)(1) and (2); *Astroline Communications Co. v. FCC,* 857 F.2d 1556, 1561 (D.C. Cir. 1988).

[11] *Id.* at 1562.

[12] 47 C.F.R. § 73.3555, Note 2(e).

Rules Violations

Section 503(b) of the Communications Act, 47 U.S.C. § 503(b), and Section 1.80(a) of the Commission's Rules, 47 C.F.R. § 1.80(a), each state that any person who willfully or repeatedly fails to comply with the provisions of the Communications Act or the Commission's Rules shall be liable for a forfeiture penalty. For purposes of Section 503(b) of the Communications Act, the term "willful" means the violator knew it was taking the action in question, irrespective of any intent to violate the Commission's rules.[13] A continuing violation is "repeated" if it lasts more than one day.[14]

Filing Violation. Section 73.3613(b)(3) of the Commission's Rules requires every commercial television permittee and licensee to file with the Commission contracts and other documents relating to its present and future ownership or control, including stock purchase agreements and options, within 30 days of the execution thereof.[15] ULB and BTC entered into the Stock Purchase Agreement, which contained the BTC's option to acquire the licensee that is the basis of the subject transfer of control application, on July 30, 1998. That agreement was not filed at the Commission until the parties filed the subject transfer application on February 17, 2004.

The Commission's Forfeiture Policy Statement sets a base forfeiture amount of $3,000 for the failure to file required information.[16] Sweetwater offers no explanation for its failure to file this agreement with the Commission. Thus, considering the record as a whole, we believe that a $3,000 forfeiture is appropriate for the violation in this case.

Reporting Violation. Section 73.3615(a)(4)(i) of the Commission's Rules requires that the contracts filed with the Commission pursuant to § 73.3613 be listed in the licensee's Ownership Reports.[17] Although the Stock Purchase Agreement, including the option for BTC to acquire control of Sweetwater, was executed in 1998 and remains in effect, it was not reported or otherwise disclosed in Ownership Reports filed on behalf of Sweetwater.[18]

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[13] *See Southern California Broadcasting, Co.,* 6 FCC Rcd 4387, 4387-88 (1991).

[14] *Id.,* 6 FCC Rcd at 4388.

[15] 47 C.F.R. § 73.3613(b)(3).

[16] *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Commission's Rules*, 12 FCC Rcd 17087, 17114 (1997), *recon. denied,* 15 FCC Rcd 303 (1999) and Section 1.80 of the Commission's Rules, 47 C.F.R. § 1.80.

[17] 47 C.F.R. § 73.3615(a)(4)(i), FCC Form 323.

[18] *See* File Nos. BOA-20010531ABP, BOA-20030603AEM and BON-20040721AMS.

The Commission's Forfeiture Policy Statement sets a base forfeiture amount of $3,000 for the failure to file required information.[19] Sweetwater offers no explanation for its failure to list this information in its Ownership Reports. Thus, considering the record as a whole, we believe that a $3,000 forfeiture is appropriate for the violation in this case.

Public Inspection File Violation. Section 73.3526(e)(5) of the Commission's Rules, requires a commercial television licensee to place in its public inspection file, among other things, an up-to-date listing or copies of those contracts, agreements and options specified in Section 73.3615(a)(4)(i) of the Rules.[20] Although the Stock Purchase Agreement, including the option for BTC to acquire control of Sweetwater, was executed in 1998 and remains in effect, there is no indication that a copy or listing of the Stock Purchase Agreement, including BTC's option to acquire the licensee, was available in the licensee's public inspection file through at least November 24, 2003, when its previously filed transfer application was dismissed.[21]

The Commission's Forfeiture Policy Statement sets a base forfeiture amount of $10,000 for violation of the public file rules.[22] Sweetwater offers no explanation for its failure to comply with the public file rules in this regard. Thus, considering the record as a whole, we believe that a $10,000 forfeiture is appropriate for the violation in this case.

Ordering Clauses

Based on our review of the facts and circumstances as set forth above, we find that Max Media has failed to raise a substantial and material question of fact that grant of the subject transfer of control application would be inconsistent with the public interest. Therefore, IT IS ORDERED That Max Media's petition to deny IS DISMISSED, and when considered as an informal objection, IS DENIED.

IT IS FURTHER ORDERED That the above-captioned application to transfer control of Sweetwater Broadcasting Company from Uhlmann/Latshaw Broadcasting, LLC to Bozeman Trail Communications Company IS GRANTED.

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[19] *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Commission's Rules*, 12 FCC Rcd at 17114, and Section 1.80 of the Commission's Rules, 47 C.F.R. § 1.80.

[20] 47 C.F.R. § 73.3526(e)(5). A licensee who keeps an up-to-date list of such contracts must provide a copy within seven days to a requesting party.

[21] Contrary to Max Media's contention, we do not believe Sweetwater made a false certification with respect to the filing of all agreements in the subsequently dismissed November 24, 2003 transfer application. While Sweetwater may have been incorrect in its original certification, it did disclose all relevant facts, including BTC's option to acquire Sweetwater, in that application. Absent any indication that it intended to misrepresent those facts, we conclude that Sweetwater did not intentionally make a false certification. *See, e.g., Public Notice on Random Verification of Financial Certifications,* 2 FCC Rcd 2122 (1987).

[22] *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Commission's Rules*, 12 FCC Rcd at 17114, and Section 1.80 of the Commission's Rules, 47 C.F.R. § 1.80.

IT IS FURTHER ORDERED, That pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.283, and 1.80 of the Commission's Rules, Sweetwater Broadcasting Company is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the total amount of sixteen thousand dollars ($16,000) for willfully and repeatedly violating Sections 73.3526, 73.3613 and 73.3615 of the Commission's Rules.[23]

IT IS FURTHER ORDERED, That pursuant to Section 1.80 of the Commission's Rules, within thirty days of the release date of this Notice/Order, Sweetwater Broadcasting Company SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture. Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Acct No. and FRN No. listed above. Payment by check or money order may be mailed to Federal Communications Commission, and P.O. Box 358340, Pittsburgh, PA 15251-8340. Payment by overnight mail may be sent to Mellon Bank /LB 358340, 500 Ross Street, Room 1540670, Pittsburgh, PA 15251. Payment by wire transfer may be made to ABA Number 043000261, receiving bank Mellon Bank, and account number 911-6106. Requests for full payment under the installment plan should be sent to: Chief, Revenue and Receivables Operations Group, 445 12th Street, S.W., Washington D.C. 20554.[24]

Finally, IT IS ORDERED That a copy this *Notice* shall be sent by First Class and Certified Mail, Return Receipt Requested to Sweetwater Broadcasting Company, P.O. BOX 419410, Kansas City, MO, 64141, and to its representative, Jonathan Lichstein, at the address listed above.

Sincerely,

Donna C. Gregg
Chief, Media Bureau

cc: Julian L. Shepard, Esquire

[23] 47 C.F.R. §§ 73.3526, 73.3613 and 73.3615

[24] *See* 47 C.F.R. § 1.1914.